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No. 02-70

Supreme Court U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

ERNIE ROE, Warden, *Petitioner,*

**v.**

JOAQUIN LESO FERNANDEZ, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

# REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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**IN THE SUPREME COURT OF THE UNITED STATES**

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ERNIE ROE, Warden, *Petitioner,*

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Petitioner, Ernie Roe, Warden, (hereafter Petitioner), respectfully submits this Reply to Respondent Joaquin Leso Fernandez's Opposition to Petition for Writ of Certiorari. Pursuant to Rule 15.6, Petitioner addresses only new points raised in Fernandez's opposition brief.

## I.

## THE NINTH CIRCUIT DECISION IS CONTRARY TO THIS COURT'S DECISION IN *BATSON* AND ITS DECISIONS CONCERNING AEDPA REVIEW

Fernandez erroneously maintains California trial courts and courts of review apply a stricter standard for establishing a prima facie showing that a party is exercising a peremptory challenge based upon a claim of group bias than required by this Court's holding in *Batson v. Kentucky*, 476 U.S. 79 (1986). Opp'n at 16-17. Fernandez also erroneously argues that the comparative and statistical analysis routinely employed by the Ninth Circuit on review of a state trial court's decision on

habeas corpus is consistent with *Batson* and its progeny. Opp'n at 19-21. Initially, however, Fernandez asserts the arguments which Petitioner makes are waived. Opp'n at 10-12. Fernandez avers that even if Petitioner's claims are not waived, the Ninth Circuit's decision in the instant case is not in conflict with this Court's jurisprudence regarding AEDPA[1] nor in conflict with any of the other federal circuit decisions. Opp'n at 13-15. These arguments contain several serious flaws and actually support a grant of certiorari by this Court.

Petitioner will not respond to each and every point made by Fernandez because most are adequately addressed in the Petition for Writ of Certiorari. Similarly, Petitioner will not respond to Fernandez's multiple claims of factual misrepresentation. The record speaks for itself. In fact, Fernandez's Brief in Opposition makes several factual misrepresentations. For example, Fernandez claims the state trial court expressly applied the standard in *Wheeler*[2] rather than *Batson* because it "treated both of [Fernandez's] motions as *Wheeler*, rather than *Batson*, motions." Opp'n at 16. But Fernandez fails to acknowledge the fact he brought "*Wheeler* motions" rather than "*Batson* motions." App. A at 3; App. B at 15; App. H at 75.

### A. The Ninth Circuit Misapplied The AEDPA By Using Its Own Circuit Authority As Clearly Established Law For Purposes Of Reviewing A State Court Decision

Fernandez claims California's standard for establishing a prima facie showing that a peremptory challenge was exercised on the basis of group bias is contrary to this Court's decision in

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1. Antiterrorism and Effective Death Penalty Act of 1996.

2. *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

*Batson*. Opp'n at 12-15 including n.3. Attempting to make this point, Fernandez compares this Court's language in *Batson* for assessing a prima facie showing – "a reasonable inference" – with the Court's standard in *Strickland v. Washington*, 466 U.S. 668 (1984) for assessing prejudice for purposes of establishing ineffective assistance of counsel – "a reasonable probability" the result would have been different. Opp'n at 14-15. Fernandez reasons language commonly articulated in California regarding the prima facie test for a *Batson* motion – "a strong likelihood" – is contrary to the language in *Batson* requiring "a reasonable inference," just as using a "preponderance of the evidence" standard for determining prejudice would be contrary this Court's holding in *Strickland*. Opp'n at 14-17. Fernandez's point fails.

While Fernandez frequently references *Wheeler* as the standard California employs for determining whether a prima facie showing is established, Fernandez never recognizes the fact this Court favorably cited *Wheeler* in *Batson* or the fact the standard in *Batson* derives directly from *Wheeler*. The California Supreme Court has consistently maintained that the standard articulated in *Wheeler*, requiring the moving party to show a "strong likelihood" that a peremptory challenge was based on group bias, is the same showing set down in *Batson* requiring a "reasonable inference." The state court's decision was not "contrary to" this Court's established authority, even if different language was employed by the state court. See *People v. Box*, 23 Cal. 4th 1153, 1187-88, 5 P.3d 130, 99 Cal. Rptr. 2d 69 (2000); *People v. Crittenden*, 9 Cal. 4th 83, 115, 885 P.2d 887, 36 Cal. Rptr. 2d 474 (1994).

Attempting to make his point, Fernandez illustrates the very reason for this Court's review; that is, the Ninth Circuit has developed "a well-settled line" of cases erroneously finding California misapplies this Court's holding in *Batson*. Opp'n at 5, 19. This "well-settled line" of Ninth Circuit authority is not only unsupported by this Court's jurisprudence under the AEDPA but also is contrary to this Court's holding in *Batson*,

itself. Consequently, the Ninth Circuit's decision, and those upon which it relies, demand this Court's review. In essence, the Ninth Circuit has provided itself with an excuse – a finding that *Wheeler* is inconsistent with *Batson* – to ignore state court findings of fact involving *Wheeler/Batson* claims – a fact driven issue – by reviewing the facts developed in state court de novo rather than with deference. This, despite the fact that the state trial court deciding the motion is best situated to make the necessary determinations to decide the motion. *Batson*, 476 U.S. at 98, including n.21. Then, the Ninth Circuit tests the facts under a standard of its own making, namely statistical and comparative analysis.

### B. Petitioner Is Not Estopped From Challenging The Underpinnings Of The Ninth Circuit's Decision

Fernandez erroneously asserts Petitioner waived the right to contest the decisions underlying the Ninth Circuit's reasoning. Fernandez argues Petitioner cannot challenge the prior decisions relied upon by the Ninth Circuit to resolve this case. Opp'n at 6-12. This argument lacks support in law or logic.

Petitioner is challenging the entirety of the decision below, which necessarily includes the reasoning, and therefore the prior decisions, upon which the Ninth Circuit relied. The authorities which Fernandez cites in support his waiver argument are inapposite to his argument. The assorted cases Fernandez cites concern arguments made and issues asserted for the first time ***following*** the grant of certiorari and not issues raised in a petition for writ of certiorari in the first instance. *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253-54 (1999) [reversing lower court decision, this Court declined to address alternative grounds for affirming when certiorari limited to single issue]; *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 462, 469-70 (1999) [declined to address alternate theories supporting lower court decision asserted after certiorari granted]; *United*

*States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) [following grant of certiorari, this Court declined to address alternate theory for affirming decision below based upon a different constitutional amendment].

Fernandez predicates his waiver claim on Petitioner's challenge to the underpinnings of two Ninth Circuit decisions relied upon in this case which were not appealed by the state at the time; specifically, *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000) and *Copperwood v. Cambra*, 245 F.3d 1042 (9th Cir. 2001). Opp'n at 10-12, including ns. 1 & 3. Fernandez points to the fact *Wade* and *Copperwood* were not challenged either in the Ninth Circuit or to this Court, and reasons a "collateral attack" should now be precluded. Opp'n at 10-12, including ns. 1 & 3. Fernandez's analysis is fallacious because it overlooks the results in *Wade* and *Copperwood*. The decisions in *Wade* and *Copperwood* upheld the state courts' denials of the *Wheeler/Batson* motions, albeit, the Ninth Circuit employed an erroneous standard of review in doing so. Pet. for Cert. at 12-13, ns. 4 & 6. For the state to have challenged the *Wade* and *Copperwood*[3] decisions on the *Wheeler/Batson* issue either in the Ninth Circuit or in this Court would have been pointless, if not futile. See Sup. Ct. R. 10.

Petitioner is not simply challenging the *Wade* and *Copperwood* decisions. Rather, Petitioner is challenging the entirety of the decision below, which relied upon the reasoning in *Wade* and *Copperwood*. Fernandez's diaphanous invocation of the waiver doctrine to prevent review of a line of authority employing an erroneous legal standard highlights the need for this Court to grant the instant petition.

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3. As Fernandez notes, Copperwood filed a petition for writ of certiorari before this Court which was denied on October 1, 2001. Opp'n at 12 n.3.

### C. A Split Exists Between State And Federal Courts Concerning The Review Of *Batson* Motions, And The Ninth Circuit's Decision Conflicts With This Court's Authority On AEDPA Review

Fernandez also claims Petitioner failed to identify a conflict between the Ninth Circuit's decision and a decision by this Court or another federal circuit court. Opp'n at 13. This point requires a twofold response. First, the state and federal appellate courts split on how and what to review concerning a *Batson* motion ruling. Second, the AEDPA review employed by the Ninth Circuit in the instant case conflicts with established authority of this Court.

First, state and federal courts split on the use of comparative and statistical analysis for purposes of reviewing the denial of a *Batson* motion, particularly, the finding of the prima facie showing. The Ninth Circuit routinely engages in comparative and statistical analysis when reviewing a trial court denial of a *Batson* motion, as it did in Fernandez's case, even though it acknowledges there is no authority in this Court's jurisprudence for engaging in such analysis. *Burks v. Borg*, 27 F.3d 1424, 1427 (9th Cir. 1994). The Seventh Circuit recently held *Batson* ***mandated*** comparative analysis on federal review of the denial of a *Batson* motion by an Illinois state court, despite the fact no comparative analysis was offered at the time of the *Batson* motion and the Illinois Supreme Court rejects comparative analysis for purposes of *Batson* review. *Henderson v. Walls*, 296 F.3d 541, 548, 551 (7th Cir. 2002). On the other hand, California, Illinois, Missouri and Texas reject the use of comparison and statistical analysis on review when no such analysis was offered in the trial court where the *Batson* motion was made. *People v. Ervin*, 22 Cal. 4th 48, 74-76, 990 P.2d 506, 91 Cal. Rptr. 2d 623 (2000); *People v. Henderson*, 142 Ill. 2d 258, 154 Ill. Dec. 785, 568 N.E.2d 1234, 1244-1250 (1990), *cert. denied, sub nom., Henderson v. Illinois*, 502 U.S. 882 (1991); *State v. White*, 753 S.W.2d 52, 55 (Mo. App

1988); *Vargas v. State*, 838 S.W.2d 552, 556-557 (Tex. Cr. App. 1992); *Turner v. State*, 861 S.W.2d 36, 38-39 (Tex.App.–Houston (14th District) 1993).

Even the federal circuit courts differ on the use of statistical and comparative analysis for *Batson* claims. The Second Circuit has held a prima facie showing under *Batson* can be established based solely on a statistical percentage analysis, even when the record does not definitively establish the actual percentages. *United States v. Alvarado*, 923 F.2d 253, 255-256 (2nd Cir. 1991). However, the Eighth Circuit rejects the idea of reviewing the question of a prima facie showing based solely on considering a statistical analysis. *United States v. Lewis*, 892 F.2d 735, 736-737 (8th Cir. 1989); *United States v. Montgomery*, 819 F.2d 847, 850-851 (8th Cir. 1987).

Indeed, there is considerable disparity – or division – amongst the state and federal courts regarding the review of a *Batson* motion. In the instant case, the Ninth Circuit employed both a comparative and statistical analysis which was not offered by Fernandez in the trial court. Contrary to Fernandez's assertion (Opp'n at 20-21), there is no law from this Court expressly condoning the use of comparative or statistical analysis for purposes of reviewing the denial of a *Batson* claim. Rather, this Court's decision in *Batson* suggests such analysis is inapprorpriate because *Batson* addressed "the defendant [carrying] his burden of persuasion" and not whether an appellate court can find reasons by making calculations from the record which would have supported the burden of persuasion had it been brought to the trial court's attention. *Batson*, 476 U.S. at 93, 96-98. Furthermore this Court declined to formulate particular procedures for the implementation of its decision in *Batson*, recognizing the wide variety of methods employed for jury selection in the state and federal courts. *Batson*, at 99 including ns.23 & 24. Therefore, federal court review of a *Batson* motion decided in state court should be restricted to the factors raised in deciding the motion and sensitive to the state court's jury selection process. Nothing in this Court's

jurisprudence justifies a statistical or comparative analysis as the litmus test for the correctness of a *Batson* ruling.

*Wade*, *Copperwood* and the instant case contravene the standards of review set forth in the AEDPA. The California Supreme Court has repeatedly confirmed that this Court's holding in *Batson* governs the standard in California courts for a prima facie showing that a party is exercising a peremptory challenge on the basis of group bias. Pet. for Cert. at 7-8. Nonetheless, the Ninth Circuit's decisions ignore or reject this fact, and employ a standard of review of its own making to find California's implementation of *Batson* is "contrary to" that decision. App. H at 87-89.

Indeed, Petitioner identified two decisions by this Court which conflicted with and overruled Ninth Circuit opinions regarding the determination whether a state court decision is "contrary to" a decision by this Court – *Bell v. Cone*, ___ U.S. ___, 122 S. Ct. 1843, 1852, 152 L. Ed. 2d 914 (2002) and *Williams v. Taylor*, 529 U.S. 362, 405 (2000). Pet. for Cert. at 9-10. The law in California regarding the prima facie showing that a party has exercised a peremptory challenge based upon group bias is not "diametrically different", "opposite in character or nature" or "mutually opposed" to this Court's decision in *Batson*. *Bell*, at 1852; *Williams*, at 405. Fernandez does not argue otherwise, but rather relies upon the faulty analysis in *Wade*. Furthermore, currently before this Court is a case addressing AEDPA review in the context of the denial of a *Batson* motion – *Miller-El v. Cockrell*, case No. 00-7662, *cert. granted*, ___ U.S. ___, 122 S. Ct. 981, 151 L. Ed. 2d 963 (2002). The instant case evinces further need for this Court to address the AEDPA constraints in the context of review of a *Batson* motion on federal habeas corpus.

## CONCLUSION

Based on this reply and the Petition for Writ of Certiorari, the Petition should be granted.

Dated: October 15, 2002

Respectfully submitted,

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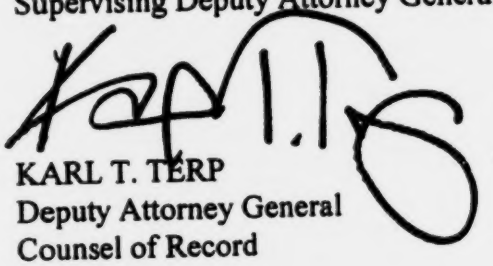

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